No. 12199.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

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Opinions Below.

The District Court did not write an opinion on any phase of the case.

Jurisdiction.

The District Court asserted and attempted to exercise jurisdiction under Title 18 U. S. C. A., Section 3231. It is appellant's contention that the District Court could not exercise its jurisdiction under said Title and Section in respect to the offenses charged in the Indictment,—the said offenses being alleged violations of Title 38 U. S. C. A., Sections 697 and 715—since the penal provisions of Section 715 of Title 38 are not incorporated into Section 697 of said Title and, therefore, the acts charged against appellant do not constitute an offense against the United States.

This Court has jurisdiction upon appeal under Title 28, U. S. C. A., Section 1291.

Statutes Involved.

The statutes involved are the World War Veterans' Act of 1924, and the Servicemen's Readjustment Act of 1944, as amended, 38 U. S. C. A., Sections 694, 697 and 715. Incidentally involved is Section 3231 of Title 18, U. S. C. A., in respect to whether, under said Section, the District Court had power to render the judgment involved in this appeal.

The pertinent portions of Sections 694, 694a, 697 and 715 of Title 38 U. S. C. A. are set forth in the brief.

Questions Presented.

Appellant will rely upon all of the points contained in her Statement of Points on Appeal. [R. Vol. 1, pp. 34, 35.] These and other points are affirmatively stated as follows:

1. The Acts charged in the Indictment do not constitute an offense by appellant against the United States.

2. The District Court has no jurisdiction to try and enter judgment against appellant for an offense which is not clearly provided by law.

3. The Indictment shows on its face that if an offense against the United States has been committed, the Bank of America is the principal; but since the Bank is not charged with any offense although it made the alleged false certificates, the appellant cannot be convicted and punished as the aider and abettor of such offense.

4. The evidence adduced at the trial is insufficient to sustain the allegations of the Indictment, or to support the verdict and judgment.

5. The District Court erred in holding and requiring as a condition of probation, that appellant make restitution to twelve supposed veterans of sums aggregating $4200 as and for loss and damage caused by offenses charged in the Indictment for which no convictions were had.

6. The District Court erred: (a) In denying appellant's motion for a judgment of acquittal; (b) in overruling appellant's motion for arrest of judgment; and (c) in overruling appellant's motion for a new trial.

Statement of the Case.

Appellant was indicted on seventeen (17) counts for the alleged offense, as charged in each of said counts, that she:

> ". . . did knowingly cause to be made a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U. S. C., Sections 694, *et seq.*), in that defendant did cause the Bank of America . . . to certify in a Home Loan Report presented to the United States Veterans Administration that the price paid . . . for the purchase of a residential lot . . . as to which a loan guarantee was sought from the Government of the United States . . . did not exceed the reasonable value thereof . . . as determined by proper appraisal . . . whereas, as defendant well knew and concealed from said bank

and Veterans Administration, the total price demanded and received by the defendant from said veteran . . . did exceed the reasonable value thereof as determined by a proper appraisal." [R. Vol. 1, p. 2.]

The averments of each count in the indictment are the same, except as to the name of the veteran, the description of and the price paid for the property, and the amount of the appraisal thereof.

The case was tried before a jury, and the jury returned a verdict of guilty as charged in the Second, Fourth, Fifth, Sixth, Ninth, Eleventh, Twelfth and Fourteenth Counts of the indictment. [R. Vol. 1, pp. 22-23.]

Defendant-appellant filed motions for a new trial [R. Vol. 1, pp. 23-24], for judgment of acquittal [R. Vol. 1, pp. 24-25] and for arrest of judgment. [R. Vol. 1, p. 25.] The Court granted appellant's motion for judgment of acquittal as to the Second and Fifth Counts [R. Vol. 1, p. 26, lines 24-25], and denied said motion as to the other counts upon which the jury returned a verdict of guilty, and denied the motions for arrest of judgment and for a new trial. [R. Vol. 1, pp. 26-27.]

The Court made and entered its judgment on the 25th day of February, 1949, finding and adjudging:

(1) That defendant is guilty as charged in Counts Four, Six, Nine, Eleven, Twelve and Fourteen [R. Vol. 1, p. 28, lines 1-3];

(2) That she be imprisoned for one year on each of said counts, and pay a fine of one thousand dollars

($1,000) for the offense stated in each such count [R. Vol. 1, p. 28, line 10, to p. 29, line 3];

(3) That she be imprisoned until said fines are paid [R. Vol. 1, p. 29, lines 2-3];

(4) That the several periods of imprisonment run concurrently [R. Vol. 1, p. 29, lines 4-7];

(5) That the sentences imposed be suspended and defendant be placed on probation for five (5) years, provided that she shall make restitution to the several veterans of the overpayments alleged to have been made by them to her, aggregating $7,300, and that she pay a fine of $2,700 to the United States of America at such times and in such amounts as the Probation Officer shall direct. [R. Vol. 1, pp. 29-30.]

All other counts of the indictment were by the Court ordered dismissed. [R. Vol. 1, p. 31.]

From said judgment defendant has appealed to this Court. [R. Vol. 1, pp. 32-33.]

Summary of Argument.

The acts charged in the Indictment do not constitute an offense against the United States of America, since they are not prohibited by the Servicemen's Readjustment Act of 1944, as amended (38 U. S. C. A., Sections 694, *et seq.*), or by any other Act of Congress.

The penal provisions of the World War Veterans' Act of 1924 (specifically, those set forth in Section 715 of Title 38 U. S. C. A.) are not incorporated into the Servicemen's Readjustment Act of 1944, as amended

(specifically into Section 697 of Title 38, U. S. C. A.), hence no penalty is provided for the acts charged in the Indictment.

The Act does not authorize the Administrator of Veterans' Affairs to promulgate any rule or regulation requiring either the seller, or the veteran, or the lender to report or certify that the price paid by the veteran for residential property does not exceed the appraised value thereof.

No act can be punished as a crime against the United States unless it is prohibited and made punishable by an Act of Congress; and the Federal Courts cannot by construction make that a crime which is not so prohibited.

A person cannot be the aider and abettor of a criminal act, or be an accessory thereto, unless the act was committed by a guilty principal.

The District Court has no jurisdiction to render a judgment of conviction for the commission of the acts charged in the Indictment, since Congress has not made such acts an offense against the United States, or provided a penalty therefor.

The District Court erred in denying defendant's motions for judgment of acquittal, for arrest of judgment, and for a new trial.

ARGUMENT.

I.

The Acts Charged in the Indictment Do Not Constitute an Offense Against the United States of America.

The offense attempted to be charged in each of Counts Four, Six, Nine, Eleven, Twelve and Fourteen of the Indictment (these being the counts upon which defendant was convicted), is that she did knowingly cause the Bank of America to make a false report to the Veterans' Administration, the alleged falsity being that the several veterans involved paid no more for the respective properties sold them than the appraised value thereof, whereas in fact they did pay sums in excess of such appraised values.

In a subsequent point of this brief, appellant will show that the Bank of America had full knowledge of the amounts paid, respectively, by the several veterans for the lots sold to them by the defendant, and that said Bank was not deceived or misled by defendant in respect to the prices so paid for said lots. Indeed, the Bank could not have been deceived in respect thereto, since the escrow papers deposited with it plainly showed the price paid by each veteran for the lot sold him, and the total price paid for both house and lot is likewise plainly shown by said escrow papers. The verdict and judgment have no support in view of this documentary evidence.

The acts charged against the defendant, even if they had been proven, do not constitute an offense against the United States for reasons now stated.

A. The Act (38 U. S. C. A., Sections 694, et seq.) Does Not Require Either the Seller, or the Veteran, or the Lender to Report to the Veterans' Administration That the Price Paid by a Veteran for Residential Property Does Not Exceed the Appraised Value Thereof.

The Act requires only one "statement" to be made concerning a loan to a veteran for the purchase of residential property. Said statement is that which is provided by Section 694(c) of Title 38, U. S. C. A., as follows:

> "*Upon making a loan as provided in this subchapter,* the lender shall forthwith transmit to the Administrator a *statement* setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of guaranty." (Italics ours.)

The statement thus required to be made must be made by the *lender,* not by the seller or by the veteran. Moreover, the Act does not require that the statement made by the lender shall state or certify that the price paid by the veteran for residential property does not exceed the appraised value thereof. The Act contains no such requirement and since that is true no such requirement may be read into it by the Government.

It is significant that Section 694(c), *supra,* requires the lender to furnish the "statement" to the Administrator *after the loan has been made and closed by the lender.* Why after, instead of before? The answer is found in Section 694(e) which provides in this behalf:

> "Any loan . . . *may be guaranteed* by the Administrator if he finds that it is in accord otherwise

with the provisions of this subchapter." (Italics ours.)

The only other provisions of the Act that have any bearing upon the making of a G. I. residential loan are found in Section 694a of Title 38, U. S. C. A., and read as follows:

> "Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property . . . *is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following* . . .
>
> "(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator." (Italics ours.)

What happens if the loan is *not* made "pursuant to the provisions" of the Act? Only this: in such event, the loan made to the veteran is not automatically guaranteed by the Veterans' Administration, and the lender must look solely to the veteran and mortgage for payment of the loan. If, nevertheless, the Administrator should issue a guarantee of a loan so made and should later discover that the loan was made pursuant to the provisions of the Act, he can revoke the guarantee for mistake or fraud practiced by the lender.

Section 694a has had little judicial construction in respect to the point under discussion. We have found only two decisions relating to the question involved, both by the Washington Supreme Court. These cases are in accord with the views here expressed, and will be cited under the next subdivision.

B. The Act Provides No Penalty Against Either the Seller, or the Veteran, or the Lender for Incorrectly Reporting to the Administrator That the Price Paid by the Veteran for Residential Property Does Not Exceed the Appraised Value Thereof.

Congress probably thought that, if the lender should incorrectly, or even falsely, report to the Administrator that the price paid by the veteran for residential property was more than the appraised value thereof, the lender would be sufficiently penalized by not having the loan guaranteed. In any event, Congress provided no specific penalty for the making of an incorrect loan statement. The Washington cases referred to, *supra,* are now submitted on the point.

In *Bryant v. Stablein,* 28 Wash. 2d 739, 184 P. 2d 45, the Washington Supreme Court said (184 P. 2d 50):

> "Although the act provides, in effect, that loans thereunder are guaranteed only if made pursuant to certain provisions, one of which is that the price to be paid by the veteran shall not exceed the reasonable value thereof as determined by an appraiser, *there is no penalty fixed for paying more or receiving more than the appraised value.* In short, the act relates simply to the conditions under which the government will guarantee a loan to the veteran in the first instance, not to contracts pending or concluded between the veteran and third persons. If the price to be paid for the property is found to exceed its appraised value, the government may refuse to guarantee the loan. If it does authorize the loan and the funds are

used for the purchase of property, the seller is not concerned with the source of the purchase price. He does not stand in the position of one who, having loaned money to the veteran, thereafter looks to the government for repayment thereof. His position is that of one who has been paid the full purchase price of his property as fixed by himself. See American Law of Veterans, 277, Section 393, and footnote 14½ thereunder."

In *Ewing v. Ford,* 195 P. 2d 650, the contention was made that payment by the veteran of more than the appraised value of the property purchased was contrary to public policy; that a legal duty existed not to pay or receive more than such appraised value; and that any plan whereby more is agreed to be paid than the appraised value is against public policy and a constructive fraud The trial court so found. But the Supreme Court rejected the contention so made, and reversed the judgment. After quoting from the *Bryant v. Stablein* case, *supra,* the Court said, at page 655 (195 P. 2d):

"In the case at bar, respondents have paid no more for the 'home property' . . . than its appraised value. But even if they had in any manner agreed to pay, and had actually paid, more than its appraised value, that transaction of itself would not have been illegal. The government might indeed have refused to guarantee a loan for a greater amount than the appraised value of the property, but, as held in the *Bryant* case, *supra,* any payment by the veteran in excess of that amount would not make the transaction of sale and purchase illegal."

These two cases plainly hold that no fraud or illegality can be imputed to a seller for receiving more for his property from a veteran than the value fixed by an appraiser designated by the Administrator.

The Act imposes no duty or obligation upon the seller of property to a veteran to make a statement or report of any kind to the Veterans' Administration as to any aspect of the sale. There is no privity between the seller and said Veterans' Administration upon which a duty to it could be based.

The Act nowhere limits the seller's right to obtain as much as he can for his property, and if such a limitation were imposed it would probably be unconstitutional. Nor does the Act limit the veteran's right to contract, except that a loan in excess of a specified amount for residential property will not be guaranteed. The veterans involved in this action were, and are, *sui juris,* hence capable of making contracts without the aid of the Veterans' Administration. They knew beyond any question the amounts, respectively, that they were paying for their lots, and likewise for the houses to be erected thereon. They were not deceived or defrauded by defendant in any respect, since they knew every fact relating to the properties purchased, and willingly entered into contracts therefor. In view of these considerations, the verdict and judgment in this case are inexplicable except, perhaps, on the ground of G. I. hysteria.

C. The Act Does Not Authorize the Administrator of Veterans' Affairs to Promulgate Any Rule or Regulation requiring Either the Seller or the Veteran, or the Lender to Report or Certify That the Price Paid by the Veteran for Residential Property Does Not Exceed the Appraised Value Thereof. Hence the Violation of Such a Rule or Regulation Does Not Constitute an Offense Against the United States.

The indictment is entitled "Indictment (38 U. S. C. 697, 715), *and the Regulations issued thereunder,*" thus indicating that the Administrator has issued a regulation, or regulations, the violation of which would presumably constitute a punishable offense against the United States. If any regulation relating to such acts as are charged in the indictment has been issued by the Administrator, it is not authorized by the Act, hence it is void, and a violation thereof would not constitute an offense against the United States. Section 694d of Title 38 U. S. C. A. contains the only provisions of the Act under which the Administrator is authorized to promulgate rules and regulations. It reads as follows:

> "The Administrator is authorized to promulgate such rules and regulations, not inconsistent with this subchapter, as are necessary and appropriate for *carrying out the provisions of this subchapter,* and may delegate to subordinate employees authority to issue certificates, or other evidence, of guaranty of loans guaranteed under the provisions of this subchapter, and to exercise other administrative functions under this subchapter." (Italics ours.)

It is obvious from its terms that Section 694d, *supra,* only authorizes the Administrator to promulgate rules or regulations of a purely administrative nature, and that he is not authorized thereby to promulgate rules or regulations the violation of which would constitute a crime. That, we may add, is the function of Congress.

It is well settled that no act can be punished as a crime against the United States unless it is prohibited and made punishable by an Act of Congress; and the federal courts cannot by construction make that a crime which is not so prohibited.

> *Langetta v. New Jersey,* 306 U. S. 451;
> *United States v. Resnick,* 299 U. S. 207;
> *Donnelly v. United States,* 276 U. S. 505;
> *Fasulo v. United States,* 272 U. S. 620;
> *United States v. Arnold,* 115 F. 2d 523;
> 22 C. J. S. 66, 67, Sec. 17 of "Criminal Law."

As was said in *Fasulo v. United States,* 272 U. S. 620, *supra,* at page 629:

> "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute. (Citing cases.)"

In *Arnold v. United States,* 115 F. 2d 523 (8 Cir.), *supra,* the Court said, at page 526:

> "As this is a criminal statute it must be construed strictly, and it cannot be enlarged by implication or intendment beyond the fair meaning of the language used. It should not, of course, be construed so as

to defeat the obvious intention of Congress. A statutory offense cannot be established by implication and there can be no constructive offense. Before an accused can be punished, his act must be plainly within the statute (citing many federal cases)."

The acts charged in the indictment—that is, the alleged acts of causing the lender to make false reports to the Administrator that the prices paid for lots did not exceed the appraised values thereof—are not mentioned in, or prohibited by, the Act of 1944 and, of course, are not mentioned or referred to in the Act of 1924.

Moreover, the Act of 1944 does not prohibit the seller of residential property to a veteran from obtaining the highest price possible for such property, nor does it limit the seller's price therefor to an amount fixed by the appraisers. The Act provides in this connection only that the lender shall furnish to the Administrator "a statement setting forth the full name and serial number of the veteran, amount and terms of loan, and the legal description of the property, together with the appraisal report made by the designated appraiser." (Section 694(c) of Title 38 U. S. C. A.) The Government has manifestly read into the Act something that is not "plainly within the statute" (*Fasulo v. United States, supra*), thus violating a cardinal rule in the construction of a federal criminal statute. Specifically, the Government has read into the Act (1) an offense consisting of the making or causing to be made of a false report; (2) the prohibition thereof, and (3) a penalty therefor. The Act contains none of these elements essential to constitute a punishable offense against the United States.

The comment of the United States Supreme Court, in *Panama Refining Company v. Ryan,* 293 U. S. 388, is pertinent. The Court said at pages 432, 433 (*id.*):

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown . . . We cannot regard (even) the President as immune from the application of these constitutional premises."

D. The Penal Provisions of the World War Veterans' Act of 1924 Are Not Incorporated into the Servicemen's Readjustment Act of 1944; but If It Be Assumed That Said Penal Provisions Are Validly Incorporated into the Servicemen's Readjustment Act of 1944, Such Provisions Do Not Apply to the Acts Charged in the Indictment, Hence the Commission of Such Acts Does Not Constitute an Offense Against the United States.

The penal provisions of the World War Veterans' Act of 1924 are codified in Sections 712, 713, 714 and 715 of Title 38 U. S. C. A. Section 712 provides that

> "whoever in any claim for benefits . . . (that is, for pensions, medical, hospital and retired officers' pay benefits) makes any sworn statement knowing it to be false, shall be guilty of perjury . . ."

Section 713 creates a punishable offense for accepting payment of a pension when the right thereto has ceased. Section 714 creates a punishable offense for receiving a pension when the recipient is not entitled thereto. Clearly, Sections 712, 713 and 714 are not applicable to the acts charged in the indictment in the case at bar.

Section 715 of Title 38 U. S. C. A. reads as follows:

> "Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both . . ."

It thus appears that the penal provisions of Section 715 apply specifically and only to the acts of a person who is guilty of making, or causing to be made, a false statement in an application for a pension (Section 701 of Title 38 U. S. C. A.), or for domiciliary care or hospital treatment (Section 706), or for emergency officers' retired disability pay (Section 710), or for receiving a pension the right to which has ceased (Section 713), or for receiving a pension without being entitled thereto. (Section 714.) The penal provisions of Section 715 are clearly limited to a veteran or some member of his family who is guilty of making a false statement for any of the purposes above mentioned, or who causes another person to make a false statement for the benefit of the veteran in respect to such purposes. Sections 30a and 485 of Title 5 U. S. C. A. refer only to civilian employees of the Government and are not pertinent to the discussion.

If the penal provisions of Section 715 (World War Veterans' Act of 1924) have become a part of the Servicemen's Readjustment Act of 1944, it is by reason of the provisions of the latter Act as codified in Section 697 of Title 38 U. S. C. A., which reads as follows:

> "Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections 30a and 485 of Title 5 and Sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 721 of this title, and the provisions of Sections 450, 451, 454a and 556a of this title, *shall be for application under this chapter.*" (Italics ours.)

Sections 450, 451, 454a and 556a are not pertinent here.

It is manifest that the phrase "shall be for application under this chapter" is vague and uncertain. It does not plainly show, or even show at all, that Congress intended that the act of causing a lender to make a false or incorrect report to the administrator concerning the price paid for residential property by a veteran—a report, by the way, not required by the act to be made—should constitute a punishable offense against the United States. Therefore, it does not meet the oft-repeated judicial requirement that "before an accused can be punished, his act must *plainly* be within the statute." (*Arnold v. United States, supra.*)

But, if it be assumed that the penal provisions of Section 715 are sufficiently incorporated into Section 697 by the phrase "shall be for application under this chapter," do such penal provisions apply to the acts charged in the indictment against appellant? We believe that, when properly analyzed, the penal provisions of Section 715 cannot be legally applied to such acts.

The wording of Section 715 clearly shows, in our view, that the penalties therein provided apply only to veterans or others entitled to benefits under the Act of 1924. There are two reasons for this view of said Section 715.

First, Section 701 of Title 38 U. S. C. A. specifically refers to "any person who served" in military or naval service, or to the "widow, child, or children, dependent mother or father" of such person. Section 706 refers to domiciliary care and hospital treatment of a veteran. Section 712 refers to "whoever in any claim for benefits" under the Act of 1924 makes any sworn statement known to be false, and makes such swearing perjury. Sections 713 and 714 refers to "any person" who shall accept payment of or receive a pension when the right thereto has ceased, or when he is not entitled thereto. These sections refer to a veteran, or other person, entitled to the benefits provided in the Act of 1924, and not to third persons.

Second, by its express terms Section 715 is applicable only to the veteran, or, if deceased, to members of his family. The Section provides:

> "Any person who shall knowingly make or cause to be made . . . a false or fraudulent . . . certificate (or) statement . . . concerning any claim for benefits under (specified sections of the Act of 1924) . . . shall forfeit all rights, claims, and benefits under said sections, and, *in addition* to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished . . ." (Italics ours.)

It is manifest that only the veteran, or some member of his family, entitled to a pension or to other benefits provided in the Act of 1924 could "forfeit his rights and claims" thereto. It is also clear that only the veteran, or

some member of his family, entitled to such benefits and who has thus forfeited them could be included in the phrase "and, *in addition* (to the loss of one's benefits) . . . shall be guilty of a misdemeanor," etc. In other words, as was urged by appellant's counsel at the trial,

> "you can't add onto something that you do not have. You could not add that additional penalty on if you did not have some right to forfeit." [R. p. 394, lines 23-25.]

So, if Section 715 can be read into Section 697, we have penalties applying only to a veteran, or to some member of his family, for making or causing to be made a false claim, statement, etc., for a pension or other benefit specified in the Act of 1924. How, then, could those penalties be extended and applied to a person who is not a veteran, or who is not related to a veteran, and who is not entitled to any benefit provided by that Act, or by the Act of 1944?

If Congress had so intended, it would have been a simple matter to provide that:

> Whoever shall make or cause to be made a false statement to the administrator for the purpose of securing the guaranty of a loan made to a veteran upon residential property, shall be guilty of a misdemeanor, and shall be punished accordingly.

Or, Congress could have easily provided, if it so intended, that

> Whoever shall make or cause to be made a statement, knowing the same to be false, that the price paid by a veteran for residential property does not exceed the appraised value thereof, shall be guilty of a misdemeanor, etc.

Even the Government conceded at the trial that the language of Section 694 is unusual and dubious in meaning.

In the colloquy between the District Judge and counsel in respect thereto, Mr. Fitting said:

> "I have never seen it before and no dictionary that I have consulted gives any clue to what it would mean other than what you get just from a reading,"

and we submit that "what you get" is doubt and uncertainty as to what it means, if indeed it has any legal meaning at all. In any event, the section does not meet the requirement that "before an accused can be punished, his act must plainly be within the statute."

II.

The District Court Has No Jurisdiction to Try and Enter Judgment Against Appellants for an Offense Not Clearly Provided by Law.

It is well settled that the criminal jurisdiction of the federal courts is only such as is expressly conferred on them by statute; and such courts can take cognizance of and punish only such crimes and offenses as they are given jurisdiction of by the laws of Congress.

> 35 Corpus Juris Secundum 780, Section 4c of Criminal Law, and cases cited;
> 18 U. S. C. A., Section 3231.

See, also, cases cited under Point I B, *ante*.

It is not necessary to repeat the argument that the penal provisions of the World War Veterans' Act of 1924 are not incorporated into the Servicemen's Readjustment Act of 1944, or that if they are incorporated therein they do not apply to the acts charged in the indictment. It is sufficient to say that the commission of the acts charged is not made an offense by any law of the United States, hence the District Court is without jurisdiction to take cognizance of the alleged acts or to punish appellant therefor.

III.

The Indictment Shows on Its Face That if an Offense Against the United States Has Been Committed, the Bank of America Is the Principal, but Since the Bank Is Not Charged With Any Offense, Although It Made the False Certificates, the Appellant Cannot Be Convicted and Punished as an Aider and Abettor of Such Offense.

Each count of the indictment charges that appellant

> "did knowingly cause to be made (by the Bank of America) a false certificate (concerning the price paid for a lot by a veteran) . . . in that defendants did cause the Bank . . . to certify . . . that the price paid . . . did not exceed the reasonable value thereof . . . as determined by proper appraisal . . . whereas, as defendant well know *and caused to be concealed* from said bank and Veterans Administration, the total price demanded and received by the defendant . . . did exceed"

such appraisal. (Italics ours.)

Thus, legally, the indictment charges appellant with having aided and abetted the Bank in the commission of a criminal offense. In the same breath it charges, in effect, that the Bank is innocent, because the price of each lot sold to a veteran was concealed from the Bank.

It is well settled that a person cannot be convicted and punished as the aider or abettor of a criminal act, or as an accessory thereto, unless the act was committed by a *guilty* principal.

> *Coffin v. United States*, 162 U. S. 664, 669;
> *Havener v. United States*, 15 F. 2d 503, 505;
> *Ito v. United States* (9 Cir.), 64 F. 2d 73, 75;

United States v. Peoni, 100 F. 2d 401;
United States v. Dellaro, 99 F. 2d 781;
Nigro v. United States, 117 F. 2d 624, 630;
Morei v. United States, 127 F. 2d 831;
Morgan v. United States, 159 F. 2d 85, 87.

There must be criminal concert of the aider and abettor with the principal (*id.*).

Appellant is charged with a crime consisting mainly, if not entirely, of her alleged failure to disclose to the Bank the actual purchase price paid by each veteran for the lot sold him, but the law imposes no duty upon the seller to inform the lender, or the Veterans' Administration, of the price paid for property by a veteran.

In the absence of any duty enjoined by law, appellant cannot be punished for mere acquiescence or inaction or failure to report the true price paid by each veteran for his lot.

22 Corpus Juris Secundum, p. 158, Section 88 of Criminal Law;
United States v. Dellaro, 99 F. 2d 781;
People v. Weber, 84 Cal. App. 2d 126.

The rule is succinctly stated in *United States v. Dellaro,* 99 F. 2d 781, at page 783, as follows:

> ". . . But we cannot agree that mere inaction makes the lessor a party to the lessee's crime, either as an accessory or as conspirator, though of course it may help to prove that the lease is a mere cover, and that he is in fact a partner. Inaction is of course acquiescence, but acquiescence is passive, and to become a party to a crime one must affirmatively

unite oneself with the venture, or, in case of a conspiracy, must agree to take some part in it."

In *People v. Weber,* 84 Cal. App. 2d 126, the Court said:

> "It is well settled that aiding and abetting the commission of a crime requires some affirmative action. The mere knowledge or belief that a crime is being committed, and the failure on the part of the one having such knowledge or belief to take some steps to present it, in no sense amounts to aiding and abetting."

Concealment, consisting in the case at bar of appellant's alleged failure to disclose to the Bank the price of a lot sold to a veteran, is not affirmative action. It is inaction, or asquiescence, hence under the authorities above cited cannot amount to aiding or abetting. Active inducement must exist; mere concealment is insufficient. Nor does such concealment make appellant a principal under Section 2 of the Criminal Code (18 U. S. C. A. Section 2). The Code defines a principal to be:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

The definitions, *supra,* contemplate more than inaction, or concealment; they clearly require positive, affirmative acts, or words which induce action by another. The words "whoever . . . aids, abets, counsels, commands, or

procures" certainly extend far beyond concealment or inaction which are passive. In the sense used in the statute, the word "causes" likewise implies more than inaction or concealment.

The acts charged in the indictment really mean and amount to *procuring* the Bank to make a false statement to the Administrator. "Procuring" is not only different from mere concealment, but is wholly inconsistent therewith.

IV.

The Evidence Is Insufficient to Sustain the Allegations of the Indictment, or to Support the Verdict and Judgment.

At the conclusion of the Government's evidence in chief appellant's counsel moved the Court for a judgment of acquittal on two grounds, to wit: (1) Because the evidence is insufficient to sustain the allegations of the indictment; and (2) because the indictment does not state an offense against the United States. [R. p. 388, lines 12-22.] After extensive argument, the motions were denied, with privilege to renew them at the conclusion of all the evidence. [R. p. 431, lines 17-19.] The motions were renewed, and again presented to the Court at the conclusion of all of the evidence [R. pp. 507-508], and were again denied by the Court. [R. p. 519, lines 13-14.]

In the argument on the motions for judgment of acquittal, appellant's counsel presented the same points of law which appear in this brief, and especially emphasized the point that appellant did not conceal from the Bank the true prices paid to her for the lots sold to the veterans, hence that she did not cause the Bank to make false

reports in respect to such prices to the Veterans' Administration.

The evidence adduced by the Government shows that there was a double escrow in fifteen of the seventeen sales which are set forth in the seventeen counts of the indictment; and that double escrows were involved in five of the six counts upon which appellant was convicted. It was argued to the trial court, and is earnestly urged here, that each of these double escrows contains documentary facts that plainly show that the Bank had, or is charged with, knowledge when it submitted its certificates or statements to the Administrator that the prices paid for the lots in question were not in excess of the appraised values thereof. Since the Bank had, or is charged with, such knowledge, it necessarily follows that appellant did not conceal from the Bank the true prices paid for the several lots, hence it was not deceived in respect thereto and was not, and could not have been, induced by appellant to make false reports as to such prices to the Administrator. To argue otherwise would be to assume that the Bank is either a fool, or a knave, or both.

Furthermore, the record affirmatively shows that appellant did not have any knowledge as to the appraised values of the lots in question at the times she made the sales thereof to veterans, or at any other time. [R. p. 66, lines 1-2.] Indeed, she could not have had any such knowledge, since the appraisals were made *after* she had entered into the sales agreements and *after* the escrow papers had been deposited with the Bank.

Two of the Bank's officers testified for the Government: Maurice Williams [R. p. 267, *et seq.*], Assistant Manager

of the Santa Monica Branch of said Bank; and Ernest E. Shacklett [R. p. 321, *et seq.*], Escrow Officer of the Pico-La Cienega Branch of said Bank. Their evidence alone is sufficient to charge the Bank with actual knowledge that the true prices paid for the lots involved in the double escrows were in excess of the appraised values thereof.

Mr. Williams testified [R. p. 311] that in arriving at the cost of a lot "we depend upon the escrow instructions" [R. p. 311, line 23] "and the application" of the veteran for a loan. [R. p. 311, line 25.] He later testified that the Bank's work sheets—more or less a summary, of the entire escrow in each sale—discloses that sums were paid by veterans on lots, outside of escrow, to appellant.

For example, Mr. Shacklett testified that work sheet [Gov't Exhibit 20-A], sale to Hyman, shows that the sum of $450.00 was paid outside of escrow by the veteran to appellant. [R. p. 336, lines 23-25, and p. 337, lines 1-5.] This exhibit also contains the words "I will hand you (the Bank) the sum of $1,550.00, $450.00 having been paid outside of escrow." [R. p. 337, lines 8-9.] A similar showing is made in the sale embodied in work sheet [Gov't Exhibit 21-B], which shows that the sum of $250.00 was paid outside of escrow to appellant. [R. p. 343, lines 5-22.] The escrow papers deposited with the Bank in the lot sale to Donald S. Regester [Gov't Exhibits 30-A and 31-A] recites, "I will hand you the sum of $1,550.00, $600.00 having been paid outside of escrow. Total consideration $2,150.00."

Government counsel elicited from appellant, on cross-examination, the following [R. p. 500, lines 23-25 and p. 501, lines 1-12]:

> "Q. Well, what I am driving at is this, Miss Karrill: Where you employed the double escrow, *the first escrow instruction always stated the precise and exact and true amount which was paid for the lot;* you remember that? A. Yes.
>
> Q. Now, was it of any interest to you that the actual amount paid appeared on that instruction? A. Because that was the amount I was getting for the lot.
>
> Q. Now, if that is true, that interest, did it carry over when you used only one instruction? A. Well, I had given the veteran a receipt or one of my brokers had given them a receipt (for the outside of escrow payment) in every instance, and they had always been assured that in the event the loan did not go through, they would get their money back." (Italics ours.)

The Government thus shows that in all double escrows "the first instruction (to the Bank) always stated the precise and exact and true amount which was paid for the lot."

If appellant intended, as charged in the indictment, to conceal the true price of the lot from the Bank, then, perhaps, the Government will try to explain to the Court why appellant would show, in the escrow paper that she was directly interested in, "the precise and exact and true price" paid to her for such lot. In view of the testimony above referred to, it is absurd to say that appellant concealed, or tried to conceal from the Bank the true price paid for any of the lots involved. It is equally absurd to

say that the Bank was deceived by appellant, or that it did not have actual knowledge of the true prices paid at the time, or times, it made the alleged false certificates to the Administrator. Nor is this all.

In the long argument and colloquy between the Court and counsel on the motion for judgment of acquittal, the following, considered alone and apart from the evidence, is sufficient to establish the correctness of our contention that the Bank had knowledge, at the time it made the alleged false certificates or statements to the Administrator, of the precise and exact and true amount which was paid (to appellant) for each lot involved in this action.

The following colloquy occurred [R. p. 418, lines 4-25]:

"*The Court:* Did the Bank commit an offense? Has not the Bank made a false statement here?

Mr. Fitting: Well, under the interpretation of the facts we have been discussing, it appears that perhaps they did.

The Court: Did the Bank commit a criminal offense?

Mr. Fitting: Perhaps we could charge them with that. However, they are not charged with it here.

The Court: Is the lending institution liable for making a false statement?

Mr. Fitting: I do not see why they should not be. Under the statute it would apply to anyone who makes or causes to be made a false certificate, and if the lending institution makes a false certificate knowingly, it seems to me that they, too, could be held.

The Court: Is there any question in your mind in respect to these double escrows but what they (the certificates) were knowingly made?

Mr. Fitting: There isn't any more.

The Court: So you say that the Bank committed an offense and that this defendant aided and abetted, is that it?

Mr. Fitting: Yes; and also caused." (Italics ours.)

It appears from this colloquy that both the Court and Government counsel agreed that the double escrows deposited in the Bank gave the Bank actual or imputed knowledge as to the true prices paid by the several veterans for the lots in question. The double escrows permit no other conclusion. Government counsel, however, insisted that appellant caused the Bank to make certificates known by it to be false. [R. p. 418, line 25.] Just how appellant, a lone woman without financial standing or influence, could cause the largest Bank in the United States to make a false report and thereby commit a crime is not explained by Government counsel or by the trial court. It is utterly fantastic to assume that the Bank could be influenced by appellant to do such a thing. It is perfectly reasonable, and consistent with the large volume of business transacted by the Bank, to conclude that, although the escrow papers fully disclosed the actual prices paid for the lots, the Bank inadvertently and carelessly overlooked that fact.

In the colloquy between Court and Government counsel, the following is also pertinent [R. p. 413]:

"The Court: Can you cause somebody to make a false statement if he is making it for his own account and he knows the true facts?

Mr. Fitting: I think . . . we certainly can . . .

The Court: Yes; you cause a person in the sense that he is acting, if you cause him to act or procure him or induce him to act; but the Bank was acting for the Bank, was it not?

Mr. Fitting: They were acting for the Bank, but also—

The Court: The Bank did not make a certificate on behalf of the defendant, did it?

Mr. Fitting: No.

The Court: It did not make the certificate as agent of the defendant, did it?

Mr. Fitting: No.

The Court: The defendant did not induce the Bank to make the statement, did it?

Mr. Fitting: For her transaction to go through for these veterans to get the loans it was necessary that the statement be made (by the Bank to the Administrator). She rigged the transaction so that it would appear that they fall within the law.

The Court: Appear to whom?

Mr. Fitting: So that the paper would come to the certifying branch, the Santa Monica Branch—

The Court: But, Mr. Fitting, you have to start with the assumption that the Bank is one entity and that everything an agent knows the Bank knows . . . So what the manager of the Pico-La Cienega Branch of the Bank of America knew, the Bank knew, did it not; and what the manager of the Santa Monica Branch knew, the Bank knew, did it not?

Mr. Fitting: Yes.

The Court: Now, you can argue practicalities, you can argue as a practical matter it may not have known, but, as a matter of law, the law charges the bank with knowledge, doesn't it?

Mr. Fitting: That is right." [R. pp. 413-414.] (Italics ours.)

The above colloquy resulted from the Government's contention that the Pico-La Cienega Branch of the Bank (where the escrows were originally made and deposited) did not transmit *all* of the papers to the Santa Monica Branch of said Bank (which made the certificates to the Administrator), and, hence, the Government argued, the Bank was not charged with knowledge in the possession of its Pico-La Cienega Branch. No argument, or citation of authority, is necessary to show the fallacy of the Government's contention. The trial Court very properly said, in respect to this contention [R. p. 409, lines 15-16]:

> "The right hand has to know what the left hand is doing"
>
> and
>
> "The law requires that every man knows what both his hands are doing." [R. p. 409, lines 20-21.]

The colloquies above set forth epitomize the evidence, and the statements and admissions of Government counsel in respect to the Bank's actual, or implied, knowledge of the true prices paid for the lots in question. They show beyond question that the Bank had, or was charged with, knowledge of the true prices paid for said lots. This being true, how could appellant have deceived the Bank? How could there be concealment by her of a fact plainly shown by documents deposited in the Bank?

The entire case against appellant must, and does, rest upon the alleged concealment by appellant of the true prices paid for the lots sold to veterans. The case fails when the evidence shows, and Government counsel grudg-

ingly admit, and the trial Court says, that the escrow papers deposited in the Bank disclose the actual and true prices paid to appellant by the veterans.

Aside from the alleged concealment and deception, there is no evidence that shows, or remotely tends to show, that appellant caused, procured, persuaded or induced the Bank to make false reports or certificates to the Administrator. Moreover, as already stated, it is utterly fantastic to assume that appellant could have caused the largest private lending institution in the United States to make false statements constituting punishable offenses against the United States.

It is also important to note in this connection certain other facts.

Appellant's purchase of the tract containing the lots sold to the veterans involved here was escrowed with the Bank of America. [R. p. 457, lines 11-16.] Appellant followed the form or pattern of escrow made up, in her original sale, by employees or officers of said Bank. [R. p. 455, lines 16-25, and p. 456, lines 1-24.]

The Government failed to produce or to offer in evidence any of the loan applications made by these veterans to the Bank. It made no effort to elicit any knowledge by the Bank of prices paid for the lots independent of the escrow, all of which it placed in evidence. It made no attempt to show, independently of the escrow papers, any effort by appellant to deceive the Bank.

Since the double escrow papers plainly show the true prices paid for lots by the veterans, and there is no evidence to the contrary, we submit that not only is the evidence insufficient to sustain the allegations of the indict-

ment or to support the verdict and judgment rendered, but that, on the contrary, the evidence rebuts and overcomes said allegations. There is, therefore, no evidence to sustain the allegations of the indictment or to support the verdict and judgment, and the same should be reversed.

V.

The District Court Erred in Holding, as a Condition of Probation, That Appellant Make Restitution to Twelve Supposed Veterans of Sums Aggregating $4,200.00 as and for Loss and Damage Caused by Offenses Charged in the Indictment for Which No Convictions Were Had.

The Court adjudged that execution of the sentence imposed under counts 4, 6, 9, 11, 12 and 14 be suspended and that applicant be placed on probation for five years, upon the condition that

> ". . . during the probationary period the defendant shall (1) make full restitution of $7,300.00, such restitution to be made at such times and in such installments as the Probation Officer of this Court shall direct, the proceeds of such restitution to be applied to reduce the loans of the veterans involved, as follows:
>
> Name of Veteran Amount of Restitution"
> [R. Vol. 1, pp. 529-30.]

Under the title "Name of Veteran" are specified the names of eighteen persons, presumably veterans, and under the title "Amount of Restitution" the amount to be paid as restitution to, or for the account of, each of said veterans is set forth opposite his name.

The Court thus ordered so-called restitution to be made to twelve supposed veterans because of offenses charged in the indictment, notwithstanding the fact that no convictions were had for said alleged offenses. The aggregate amount thus erroneously ordered to be paid is $4,200.00.

The District Court is without power to require restitution of loss or damages caused by an alleged offense for which no conviction was had. This plainly appears from the provisions of Section 3651 of the new Criminal Code (18 U. S. C. A., Sec. 3651). Among other things, that section provides:

> "While on probation and among the conditions thereof, the defendant—
>
> * * * * * * * *
>
> May be required to make restitution or reparation to aggrieved parties for *actual damages or loss caused by the offense for which conviction was had . . .*" (Italics ours.)

No convictions were had upon eleven counts of the indictment. It follows, of course, that the Court is without power to require restitution of supposed damages or loss, even if the same had been proven, which is denied, caused by the offenses charged in the eleven counts mentioned for which appellant was not convicted.

Furthermore, there is no evidence in the record that shows that any of the six veterans named in the counts upon which appellant was convicted, suffered any actual damages or loss. In the absence of such a showing, the Court erred in ordering restitution even to said six veterans.

Moreover, appellant was ordered to make restitution to one person, presumably a veteran, who is not even mentioned in any of the seventeen counts of the indictment. Including the amount ordered to be paid to this person [Irving J. Stein, $250.00, R. Vol. 1, p. 30, line 12] the Court has erroneously ordered appellant to pay the aggregate sum of $4,200.00 in respect to offenses for which no convictions were had. The judgment is, therefore, erroneous and should be reversed for this, as well as for other reasons, *ante*.

VI.

The District Court Erred: (a) In Denying Appellant's Motion for a Judgment of Acquittal; (b) In Overruling Appellant's Motion for Arrest of Judgment; and (c) In Overruling Appellant's Motion for a New Trial.

As already stated, *ante,* appellant filed motions for judgment of acquittal, the first at the conclusion of the Government's evidence in chief, and the second at the conclusion of all the evidence in the case. The grounds of these two motions were: (1) That the indictment does not state a public offense against the United States; and (2) that the evidence is legally insufficient to sustain the allegations of the indictment. [R. Vol. 1, p. 27.]

Thereafter appellant filed motion for arrest of judgment upon the same grounds set forth in her motion for a judgment of acquittal. [R. Vol. 1, p. 29.]

Thereafter appellant filed motion for a new trial upon the grounds: (1) That the Court erred in denying her

motion for judgment of acquittal; (2) that the verdict is contrary to the weight of the evidence; and (3) that the verdict is not supported by substantial evidence. [R. Vol. 1, p. 24.] Two other grounds were included, but are not relied on here.

It is unnecessary to argue Point VI, *supra,* in detail, since the sufficiency of the evidence to sustain the allegations of the indictment, or to support the verdict and judgment, has been fully presented under Point IV, *ante.*

The three motions above indicated were made and presented at the times required, and in due course. These motions should have been granted, and we submit that the Court erred in denying them.

Conclusion.

The following propositions have been established, from the record, in this brief:

(1) The acts charged in the indictment do not constitute an offense against the United States, for which appellant can be punished.

(2) The District Court is without jurisdiction to try and enter judgment against appellant because of the acts alleged in the indictment, since the commission of said acts is not made an offense against the United States by any Act of Congress.

(3) If an offense has been committed against the United States, the Bank of America is the guilty principal, and appellant cannot be convicted for aiding and

abetting the Bank until and unless it is first convicted as such principal.

(4) The evidence does not sustain the allegations of the indictment, or support the verdict and judgment.

(5) The District Court is without power to require, and erred in requiring, appellant to make restitution of alleged loss and damage resulting from alleged offenses for which she was not convicted.

(6) The Court erred in denying appellant's motions for judgment of acquittal, for arrest of judgment, and for a new trial.

Wherefore, appellant prays that the judgment of the District Court be reversed.

Respectfully submitted,

JOHN W. PRESTON,
Attorney for Appellant.